APPLICATION FOR

DISTRICT COURT JUDGESHIP

A. PERSONAL INFORMATION

1. *Full name*: Tracy Labin Rhodes
2. *Birthdate*: July 23, 1969
3. *Current home address*: [redacted]
4. *Email address*: [redacted]
5. *Preferred phone number*: [redacted]
6. *Judicial position you are applying for*: Eighth Judicial District Court Judge
7. *Date you became a U.S. citizen, if different than birthdate*: Same
8. *Date you become a Montana resident*: August 1, 2004

B. EDUCATIONAL BACKGROUND

9. *List the names and location (city, state) of schools attended beginning with high school, and the date and type of degree you received*:

School Name	Location	Date of Degree	Degree
• **Buffalo Seminary**	Buffalo, NY	1987	Diploma
• **University of Notre Dame**	South Bend, IN	1991	B.A.
• **Stanford Law School**	Palo Alto, CA	1994	J.D.

10. *List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.*

University of Notre Dame:

- Athletic Trainer, Notre Dame football team, 1987-1988, 1989-1991
- Study Abroad, Angers, France University Catholique De L'Ouest, 1988-1989

Stanford Law School:

- Member of the Federalist Society, 1991-1994
- Executive Editor of the Stanford Journal of International Law, 1992-1994
- Member of the Native American Law Students' Association, 1991-1994
- Recipient of the U.S. Department of Education Indian Law Fellowship, 1993
- Recipient of the Stanford Lyons Award for Service for co-developing a Stanford Law School Course, "Native American Common Law and Legal Institutions," 1994
- Recipient of the Skadden Fellowship, a prestigious two-year fellowship awarded annually by the Skadden Fellowship Foundation to 25 talented young lawyers across the nation to pursue public interest law.

C. LEGAL AND PROFESSIONAL EXPERIENCE

11. *In chronological order (beginning with most recent), state each position you have held since your graduation from law school. Include the dates, names and addresses of law firms, businesses, or governmental agencies with which you have been affiliated, and your position. Include the dates of any periods of self-employment and the name and address of your office.*

Labin Rhodes Law, PLLC Solo Practitioner, Sole Owner 2005-present

LABIN RHODES LAW

(formerly Tracy Labin Rhodes, PLLC)
(formerly Tracy Labin Rhodes)

2000 Dodd Ranch Rd.
Missoula, MT 59808

Alexander Blewett III, School of Law at the University of Montana 32 Campus Dr. Missoula, MT 59812	Acting Director, Indian Law Clinic and Visiting Associate Professor	2004-2005
Native American Rights Fund 1712 N. St., NW Washington, D.C. 20036 1506 Broadway Boulder, CO 80302	Skadden Fellow, Senior Staff Attorney	1994-2004

12. *In chronological order (beginning with most recent), list your admissions to state and federal courts, state bar associations, and administrative bodies having special admission requirements and the date of admission. If any of your admissions have terminated, indicate the date and reason for termination.*

Court or Administrative Body	Admission
• Montana Supreme Court	August 10, 2004
• United States Supreme Court	February 23, 1998
• United States Court of Appeals for the Eighth Circuit	January 5, 1996
• United States Court of Appeals for the Tenth Circuit	December 2, 1994
• United States Court of Appeals for the Federal Circuit	November 2, 1995
• United States Court of Federal Claims	August 15, 1997
• United States District Court for the Western District of Oklahoma	September 23, 1997

- California State Bar, relinquished license after moving to Montana in 2004
- Colorado State Bar, relinquished license after moving to Montana in 2004
- Washington, D.C. Bar, relinquished license after moving to Montana in 2004

13. *Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., real estate, water rights, civil litigation, criminal litigation, family law, trusts and estates, contract drafting, corporate law, employment law, alternative dispute resolution, etc).*

Areas of Practice

(My practice includes both trial court and appellate court practice)

- Representation of parents and children in dependency and neglect (DN) proceedings
- Representation of parents in dissolution and parenting plan actions
- Representation of parents in custody and guardianship disputes under the Uniform Child Custody Jurisdiction and Enforcement Act
- Representation of parties defending against orders of protection
- Representation of clients in private termination and stepparent adoption cases
- Representation of clients in tort claims and 1983 actions
- Representation of clients in collection matters and other civil matters involving banking regulations and privacy issues
- Representation of clients seeking Individualized Education Plans (IEPs) in their school districts
- Representation of clients on employment matters
- Representation of client in involuntary commitment case
- Serving as Guardian Ad Litem for children involved in the legal system
- Serving as Special Master in complex trust and estate matter
- Serving as Special/Pro Tempore Judge in tribal trial and appellate courts on civil and criminal matters
- Serving as Substitute Justice of the Peace for Missoula County Justice Court on civil and

criminal matters

Approximate Percentages of Practice

- State trial court practice (serving as counsel in civil cases primarily involving DN and domestic/family issues): 40%
- State appellate court practice (serving as counsel in civil cases involving DN, domestic/family, and jurisdictional issues: 40%
- State and Tribal trial and appellate court (serving in a judicial capacity): 20%

14. *Describe any unique aspects of your law practice, such as teaching, lobbying, serving as a mediator or arbitrator, etc. (exclude bar activities or public office).*

My 27-year career as a licensed attorney has been marked by uniqueness.

I started my career on a Skadden Fellowship. The Skadden Fellowship is a prestigious and competitive fellowship awarded to only 25 law students each year which provides recipients two years of funding to pursue public interest careers on a full-time basis. As a member of the Lower Mohawk Band of Indians and a descendant of the Seneca Nation, I chose to use my fellowship to work at the Native American Rights Fund (NARF), a national nonprofit law firm representing Native American tribes and tribal members. At the end of my two years, I was hired by NARF as a full-time senior staff attorney, and served in that capacity for another 8 years.

As a NARF attorney, I did a substantial amount of appellate litigation in the United States Supreme Court, Federal Circuit Courts of Appeal, and Federal District Court. My practice included a wide range of complex civil matters involving tribal jurisdiction and sovereignty, property rights, water rights, breach of trust, education, employment and taxation.

In addition to the brief writing and oral arguments involved in litigation, I also assisted tribes in developing tribal codes, worked on water rights settlements, negotiated with federal agencies including the Department of the Interior, and the Department of Justice, lobbied in Congress, spoke extensively at national and regional conferences (several of which I organized or co-organized), sat on law school boards, and ran the organization's internship program. And, I developed and ran the Tribal Supreme Court Project, a national project of NARF and the National Congress of American Indians to improve tribal advocacy before the United States Supreme Court.

Upon moving to Montana in 2004, I served as interim director of the Indian Law Clinic and Visiting Associate Professor at the Alexander Blewett, III School of Law at the University of Montana under a one-year contract. In this capacity I supervised students in the practice of law, as well as developed and taught courses on federal and tribal law.

Since 2005, I have been a sole practitioner focusing substantially on dependency and neglect (DN) cases. DN cases are a unique breed of civil cases. Although they are civil, they are brought by the State and involve fundamental constitutional rights, and thus share similarity with criminal cases. They are lengthy and complex cases involving issues of constitutional law and elaborate statutory schemes, companion criminal cases, and treatment court cases. At the trial court level, DN cases involve frequent court appearances as well as participation in many mediation type treatment team meetings and family engagement meetings. They also involve substantial work outside the courtroom with parties, counsel, witnesses, families, and agencies in various counties, states and reservations, and involve a broad range of clients with physical and mental disabilities, mental health and chemical dependency issues, involvement in criminal proceedings, significant trauma backgrounds, and monetary difficulties.

Being a sole practitioner and running a solo practice itself is unique and distinguishable from practicing with a firm, organization, governmental entity, or corporation. As a one-woman show, I am not only a lawyer, but am my own secretary, paralegal, investigator, IT support, and office manager. I do all my own research, briefing, motion drafting, brief formatting, editing, cite checking, court appearances, and meetings. I maintain all correspondence, and telephone, email, and letter contact with opposing counsel, agency representatives, and clients. I do all my own contracting, invoicing, and bill collecting. I do all my own printing, copying, and filing. I do all banking, credit card transactions, taxes annual reports, bar reporting, CLE compliance, marketing, and maintenance of malpractice insurance. And, I do all my own office maintenance, including purchasing and maintaining all office equipment and supplies, computers, and online services.

15. *Describe the extent that your legal practice during the past ten years has included participation and appearances in state and federal court proceedings, administrative proceedings, and arbitration proceedings.*

All my legal practice in the past 10 years has been in the State judicial system. Prior to Covid-19 restrictions, I appeared in District Courts, including the districts for the counties of Missoula, Mineral, Lake, Sanders, Ravalli, and Lewis and Clark approximately 15 per month. I have filed innumerable motions and briefs, including opening briefs, reply briefs, Anders briefs, petitions for rehearing and petitions for certiorari, in the Montana Supreme Court in appeals arising from jurisdictions throughout the State.

16. *If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases.*

Cases Awaiting Decision

- *In re F.J.S.*, DA 19-0351
- *In re T.A.K.A.*, DA 20-0473

Published Opinions

- *In re B.J.J., Jr.*, 2019 MT 129
- *In re X.M.*, 2018 MT 264
- *In re A.J.C.*, 2018 MT 234
- *Cromwell v. Schaeffer*, 2018 MT 235
- *In re A.S. and A.M.*, 2016 MT 156
- *In re A.W.S. and K.R.S.*, 2016 MT 194
- *In re J.B., Jr.*, 2016 MT 68
- *In re J.O.*, 2015 MT 229
- *In re T.D.H., J.H., J.H.*, 2015 MT 244

Memorandum Opinions/Non-Cites

- *In re S.P.*, (DA 20-0314), 2021 MT 57N
- *In re Marriage of Niquet*, (DA 19-0244), 2020 MT 135N
- *In re K.P.*, (DA 19-0198), 2019 MT 272N
- *In re A.A.G.G.*, (18-0612), 2019 MT 143N
- *In re A.R.N.*, (DA 16-0755), 2017 MT 133N
- *In re X.S., K.S., A.S., I.S.*, (DA 16-0508), 2107 MT 27N
- *In re N.P.-S.*, (DA 16-0472), 2017 MT 105N
- *In re L.M.F., N.R.F., N.M.F., K.J.F., K.W.F.*, (DA 16-0415), 2017 MT 14N
- *In re A.D. and K.D.*, , (DA 16-0089), 2016 MT 217N
- *In re J.W., F.L., A.W., T.F.*, (DA 14-0677), 2015 MT 128N

Anders Brief filed

- *In re A.C.*, DA 20-0280
- *In re M.M., L.M., C.M., S.M., N.M.*, DA 19-0029, 19-0030, 19-0031, 19-0032, 19-0033
- *In re G.P., D.P., M.P.*, DA 17-0279, 17-0280, 17-0281

Writs of Certiorari

- *A. Niquet v. J. Manley*, OP 19-0198, Writ of Certiorari denied

17. *Describe three of the most important, challenging, or complex legal issues you have dealt with or legal proceedings in which you have participated during your practice.*

- In the 2001 term, the United States Supreme Court rendered two opinions devastating to Indian law and longstanding principles of tribal sovereignty and jurisdiction. These opinions capped off what had been an 80% loss rate before the Supreme Court for tribes. In response, the Native American Rights Fund (NARF) and the National Congress of American Indians (NCAI) joined forces to create the Tribal Supreme Court Project (Project). The goal of the Project was to coordinate and strengthen the advocacy of Indian issues before the United States Supreme Court, to develop new litigation strategies, to coordinate tribal legal resources, and to ultimately improve tribes' win-loss record. The Project was housed at NARF and staffed solely by me.

  Although tribes were not alone in developing an institutional structure to improve advocacy, (for instance, both the National Association of Attorneys General and the Defender Services Division Training Branch had already developed similar programs), the Tribal Supreme Court Project was the first time such a coordinated and structured effort had been attempted to improve Indian advocacy before the nation's highest tribunal. It was thus a Project I built from the ground up.

  Through the Project I established a working group of more than 200 noted attorneys and academics from around the nation who specialized in Indian law and other areas of law impacting Indian cases, including property law, trust law, and Supreme Court litigation. I assisted counsel with brief preparation and moot courts, monitored Indian cases in state and federal appellate courts that had the potential to reach the Supreme Court, assisted tribes in determining whether to seek Supreme Court review, and coordinated and wrote numerous amicus briefs on behalf of hundreds of tribes.

  I am proud to say that following development of the Tribal Supreme Court Project, the win-loss rate before the Supreme Court did improve and that the Project successfully continues today.

- Another career highlight and accomplishment of which I am particularly proud occurred in my representation of a father who had his child removed by the State in a dependency and neglect proceeding and who was simultaneously fighting a custody case with the child's grandmother. I inherited these cases from another attorney who had determined that no viable legal issues existed. I disagreed. I litigated the cases through the district court, and then appealed them to the Montana Supreme Court. In September, 2018, the Montana Supreme Court unanimously decided in two *en banc* rulings—an astonishingly rare occurrence in dependency and neglect and parenting plan cases—that the State had unconstitutionally and improperly deprived this Father of his fundamental right to parent, and that the District Court erred in even entertaining Grandmother's parenting plan action. (*In re A.J.C.*, 2018 MT 234, and in *Cromwell v. Schaeffer*, 2018 MT 235.) Father was happily reunited with his son, and today they are thriving as a family.

- Although I have not prevailed, I have challenged the constitutionality of the appellate standard of review in dependency and neglect cases in Montana. Although the United States Supreme Court has determined that a state must bear a "clear and convincing" burden of proof to terminate parental rights (a burden of proof higher than then "preponderance of the evidence" standard employed in all other civil cases, but less than the "beyond a reasonable doubt" standard employed in criminal cases). In termination cases, the Montana Supreme Court does not review whether the State has met its burden of clear and convincing evidence below, however. Rather, the Court, (unconstitutionally, in my reading of the law), reviews termination cases under the same standard of review it uses in all other civil cases.

18. *If you have authored and published any legal books or articles, provide the name of the article or book, and a citation or publication information.*

    - *We Stand United Before the Court: The Tribal Supreme Court Project*, 37 NEW ENG. L. REV. 695 (2003). Discussed the birth and purpose of the Tribal Supreme Court Project and delved into the legal issues involved in *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).

    - *2000 Tribal Law & Governance Conference Case Reconsideration, United States v. Kagama, Appellant's Brief* (with Keith Harper), 10 KAN. J. L.& PUB. POL'Y 419 (2001). Reargued an 1886 Supreme Court Indian law case.

19. *If you have taught on legal issues at postsecondary educational institutions or continuing legal education seminars during the past ten years, provide the title of the presentation, date, and group to which you spoke.*

    N/A

20. *Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.*

    Over the past 5 years, I have performed hundreds of hours of pro bono services for indigent or modest means clients, and many more hours at reduced rates. I am, however, woefully behind in reporting all of them to the bar association and cannot provide precise information. However, in 2018 alone, however, I believe I reported approximately 160 hours of pro bono services to the bar.

    Almost all of my pro bono work has been in the area of domestic relations, such as dissolutions involving children, parenting plan actions, guardianships, and other custody matters. Although neither indigent parents nor children in these

types of actions are entitled to state funded representation, the legal issues and complex nature of many cases exceeds the ability of many *pro se* litigants. The pro bono cases I have taken have been legally complex and highly contentious cases where fair and legal outcome has required the participation of knowledgeable counsel.

21. *Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession.*

Between 1994-2004 I served two terms as the Co-Chair of the Federal Bar Association Annual Federal Indian Law Conference; served as Vice President of the Colorado Indian Bar Association; served as a Board Member on the Indian Law Clinic Advisory Board at the University of Colorado at Boulder Law School; served as a Board Member on the Natural Resources Law Center Advisory Board, University of Colorado at Boulder Law School; and served as a Board Member on the Board of the Colorado Bar Association, Young Lawyers Division.

22. *Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, and type of discharge received.*

N/A

23. *If you have had prior judicial or quasi-judicial experience, describe the position, dates, and approximate number and nature of cases you have handled.*

Missoula County	Substitute	2017-2018
Missoula, MT	Justice of the Peace	

I sat frequently in the role of Substitute Justice of the Peace and presided over hundreds of cases, including first appearances and bail determinations in felony cases, arraignments and bail determinations in misdemeanor cases, resolution and sentencing in misdemeanor cases (ranging from driving violations, DUIs, misdemeanor possessions, to violations of fish and game regulations), evictions, and orders of protection.

Fourth Judicial District Court	Special Master	2016-2018
Missoula, MT	Settlement Master	

I presided over and made determinations on portions of a complex trust matter, and mediated a settlement in a complex dissolution and property dispute.

Fort Belknap Tribal Court of Appeals Appellate Judge 2016-2018
Harlem, MT

I presided over three appeals involving litigation that had gone unreviewed for years and involved litigants filing proceedings in competing tribal jurisdictions.

Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Judge Pro Tempore 2010-2018
Pablo, MT

I presided over a years' long domestic dispute, a criminal case involving the Chief Justice and a law clerk.

Fort Peck Tribal Court Special Judge 2013-2014
Poplar, MT

I presided over three civil suits brought against the Tribes, involving injunctions and employment terminations, including termination of a tribal court judge.

24. *Describe any additional business, agricultural, occupational, or professional experience (other than legal) that could assist you in serving as a judge.*

Without question, I have gained the most relevant experience for serving in the judiciary from my job as mother of four children (now 10, 12, 14, and 15). This role has required 24/7 learning, developing and cultivating patience, compassion, time management, conflict resolution, problem solving, multi-tasking, and scheduling.

D. COMMUNITY AND PUBLIC SERVICE

25. *List any civic, charitable, or professional organizations, other than bar associations and legal professional societies, of which you have been a member, officer, or director during the last ten years. State the title and date of any office that you have held in each organization and briefly describe your activities in the organization and include any honors, awards or recognition you have received.*

- DeSmet School Booster Club (DSBC) Board, Board President, 2012-2016. (DSBC is a non-profit organization created to provide resources and programs to the students at the DeSmet Elementary and Middle School.) Secured 5d01(c) (3) status for the organization; ran the monthly meetings, conducted yearly mission planning; wrote grants; organized and supervised events for the students; engaged in fundraising.

- Mountain Home Montana Board of Directors, Board Member/Member of Personnel and Grievance Committee, 2013-2015. (Mountain Home Montana provides shelter and support services for young mothers to enable them to reach a place of stable mental health and financial security and to provide safe and nurturing homes for their children.) Participated in monthly and special meetings; oversaw and directed operations of the organization
- Missoula Indian Center Board of Directors, Secretary /Board Member/ Chair of the Personnel and Grievance Committee, 2010-2012. (Indian Health Service provider.) Participated in monthly and special meetings; oversaw and directed operations of the organization and ultimately participated in investigations into and corrections of those operations; kept meeting minutes; conducted grievance hearings.

26. *List chronologically (beginning with the most recent) any public offices you have held, including the terms of service and whether such positions were elected or appointed. Also state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.*

I have never run for, nor held public office. I have, however, sought appointment for three judicial positions with the Fourth Judicial District, Missoula and Mineral Counties, for which I was unsuccessful.

- In January, 2021, I applied for the position of Standing Master
- In May, 2019, I sought appointment as District Court Judge
- In November, 2018 I sought appointment as District Court Judge

E. PROFESSIONAL CONDUCT AND ETHICS

27. *Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.*

No.

28. *Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.*

No.

29. *Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.*

In 2020, in the midst of a lengthy and contentious divorce I was ticketed for Interference with Parent Child Relationship, a misdemeanor. Upon motion of the prosecutor, the charges were dismissed.

30. *Have you ever been found liable in any civil proceedings for damages or other legal or equitable relief, other than marriage dissolution proceedings? If so, provide the citation of a reported case or court and case number for any unreported case and the year the proceeding was initiated (if not included in the case number).*

No.

31. *Is there any circumstance or event in your personal or professional life that, if brought to the attention of the Governor or Montana Supreme Court, would affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.*

No.

F. BUSINESS AND FINANCIAL INFORMATION

32. *Are you currently an owner, officer, director, or otherwise engaged in the management of any business other than a law practice? If so, please provide the name and locations of the business and the nature of your affiliation, and state whether you intend to continue the affiliation if you are appointed as a judge.*

No.

33. *Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? If not, please explain.*

Yes.

34. *Have you, your spouse, or any corporation or business entity of which you owned more than 25% ever filed under title 11 of the U.S. Bankruptcy Code? If so, give details.*

No.

G. JUDICIAL PHILOSOPHY

35. *State the reasons why you are seeking office as a district court judge.*

I love the law.

I believe in, and want to protect the Constitution.

My true passion is justice.

36. *What three qualities do you believe to be most important in a good district court judge?*

- Ruling with dispassion, but compassion.
- Providing litigants with their fundamental, constitutional right to be heard.
- Following the law and adhering to the rule of law.

37. *What is your philosophy regarding the interpretation and application of statutes and the Constitution?*

Where there is direct precedent, it is the obligation of the trial court to apply that law, no matter how difficult the facts make that application, and irrespective of the judge's personal feelings about the correctness of the law as established by the legislature or interpreted by a higher court. Only with consistent application of the law can a judge ensure that the public has confidence in our legal system.

Balanced against this application of precedent, however, is the understanding that direct application of the law is not always possible. For instance, cases may present issues of first impression or involve matters that are left to the discretion of the trial court judge. In such instances, the district court judge needs to exercise good, reasoned judgment, and must determine what is right in a particular situation to ensure the most equitable and just outcome. In reaching this outcome, the judge should not be swayed by personal opinion, bias, political pressure, or by the income, race, gender, or any other non-relevant attribute, of the litigants.

Above all else, a judge must follow the principles set forth in the United States and Montana Constitutions, particularly those involving ensuring the due process of law.

H. MISCELLANEOUS

38. *Attach a writing sample authored entirely by you, not to exceed 20 pages. Acceptable samples include briefs, legal memoranda, legal opinions, and journal articles addressing legal topics.*

*Attached

39. *Please provide the names and contact information for three attorneys and/or judges (or a combination thereof) who are in a position to comment upon your abilities.*

- Matthew Lowy
  Lowy Law, PLLC
  103 S. 5th St. E.
  Missoula, MT 59801
  (406) 926-6500

- Rochelle Wilson
  Wilson Law
  725 SW Higgins St.
  Suite C
  (406) 543-0789

- Chad Wright
  Montana Office of the Public Defender
  Appellate Defender Division
  555 Fuller
  P.O. Box 200147
  Helena, MT 59620
  (406) 444- 9505

*Also appended, letters of recommendation submitted with my 2019 application for appointment as District Court Judge for the Fourth Judicial District.

CERTIFICATE OF APPLICANT

I hereby state that to the best of my knowledge the answers to all questions contained in my application are true. By submitting this application I am consenting to investigation and verification of any information listed in my application and I authorize a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions I have attended, any references furnished by me, employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to my citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history to release to the Office of the Governor of Montana or its agent(s) any information, files, records, or reports requested in connection with any consideration of me as a possible nominee for appointment to judicial office.

I further understand that the submission of this application expresses my willingness to accept appointment as District Court Judge if tendered by the Governor, and my willingness to abide by the Montana Code of Judicial Conduct and other applicable Montana laws (including the financial disclosure requirements of MCA § 2-2-106).

_____ _____

(Date) (Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by ***5:00 p.m. on Tuesday, June 1, 2021***

Mail the signed original to:

Hannah Slusser
Governor's Office
P.O. Box 200801
Helena, MT 59620-0801

Send the electronic copy to: hannah.slusser@mt.gov

TRACY LABIN RHODES
WRITING SAMPLE
[Note: This is an excerpt from the Argument section of my appellate brief written in In re A.J.C., 2018 MT 234]

I. THE DISTRICT COURT COMMITTED MULTIPLE LEGAL ERRORS WHICH DENIED FATHER DUE PROCESS AND UNCONSTIUTIONALLY DEPRIVED HIM OF HIS FUNDAMENTAL RIGHT TO THE CARE AND CUSTODY OF HIS CHILD THROUGHOUT THESE PROCEEDINGS

It is axiomatic that Father has a fundamental liberty interest in the care and custody of his child and that he is entitled to due process under the Constitutions of Montana and the United States. As this Court has repeatedly held, "the right to parent one's children is a constitutionally protected fundamental liberty interest." *In re L.V.-B.*, 2014 MT 13, ¶ 15, 373 Mont. 344, 317 P.3d 191; *In re A.S.*, ¶ 12; *In re A.C.*, 2001 MT 126, ¶ 20, 305 Mont. 404, 27 P.3d 960; *In re J.N.*, 1999 MT 64, ¶ 12, 293 Mont. 524, 977 P.2d 317; *In re A.S.A.*, 258 Mont. 194, 952 P.2d 127, 129 (1993). It is a liberty interest protected by Article II, § 17 of the Montana Constitution and by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *In re L.V.-B*, ¶ 15; *See* U.S. Cons. Amend. XIV. Both the Montana Supreme Court and the United States Supreme Court have ruled that due process requires that, a natural parent's right to the care and custody of their child "must be protected by fundamentally fair procedures." *In re D.B.*, 2007 MT 246, ¶ 17, 339 Mont. 240, 168 P.3d 691; *In re A.S.A.*, 952 P.2d at 129; *In re A.C.*, ¶ 20; *Santosky v. Kramer*, 455 U.S. 745, 754, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

The United States Supreme Court has also recognized that the right to due process "guarantees more than fair process." The clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2059-2060, 147 L.Ed.2d 49 (2000).

Our Court's jurisprudence has "stressed the constitutional protection of a natural parent's right to the custody of his or her child." *In re A.R.A.*, 277 Mont. 66, 919 P.2d 388, 391 (1996); *In re J.N.P.*, 2001 MT 120, ¶ 17, 305 Mont. 351, 27 P.3d 953. As this Court has held:

> There are, however, few invasions by the state into the privacy of the individual that are more extreme than that of depriving a natural parent of the custody of his children. For this reason, the legislature carefully enunciated the procedures the state must follow and the findings which the court must make before custody of a child may legally be taken from his natural parent.

In re Guardianship of Doney, 174 Mont. 282, 570 P.3d, 575, 577 (1977).

The "careful protection of parental rights is not merely a matter of legislative grace, but is constitutionally required." *In re Guardianship of Doney*, 570 P.2d at 577 (*citing Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).) "This constitutional protection is based upon the integrity of the family unit which necessarily includes the child's right to be with his or her natural parent." *In re A.R.A.*, 27 P.3d at 391.

As the Court has also recognized, however, "the constitutional protection surrounding family rights is tempered by the State's *parens patriae* responsibility to protect the welfare of the children." *In re M.A.L.*, 2006 MT 299, ¶ 26, 334 Mont. 436, 148 P.3d 606.[1] As the Court recognized, that responsibility is defined and limited by statute:

> Title 41, Chapter 3 of the MCA provides procedures by which the State may become involved in the care and custody of children in Montana and when the State may remove a child from the parent's custody or terminate the legal parent-child relationship. *See generally* Title 41, Chapter 3, parts 3, 4, and 6, MCA. Under these provisions, the child's custody may be transferred from a natural parent to the State or other third party upon a court order entered after a finding that the child is a youth in need of care. Section 41-3-438(3), MCA (2003). A

[1] "*Parens patriae* traditionally refers to the role of the state as sovereign or guardian of persons who are under a legal disability, such as juveniles, and stands for "the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents." *In re M.A.L.*, ¶ 26.

> youth in need of care determination must be based on a finding that the child is abused, abandoned, or neglected. Section 41-3-102(29), MCA (2003). In such a case, the State can intervene without the parent's consent, and, upon clear and convincing proof, a parent determined by a court of law to be unfit, as defined in § 41-3-609, MCA, must yield his or her vested right in the care and custody of his or her child.

In re M.A.L., ¶ 26.

By the following errors, the district court and the Department denied Father due process and unconstitutionally deprived him of the full right to the care and custody of his child:

A. The district court erred in awarding custody of A.J.C. to a third party in the course of an abuse and neglect action

Following the district court's adjudication of A.J.C. as a youth in need of care, and its grant of temporary legal custody to the Department under the statutory scheme set forth in Title 41, M.C.A., and while the Title 41 action was still pending, Grandmother filed a petition for a parental interest and for a parenting plan under Mont. Code Ann. § 40-4-228. (DR D.C. Doc. 45.) The district court consolidated this case with Father's parenting plan action and, also during the pendency of the Title 41 case, ordered a parenting plan in which A.J.C. would live primarily with Grandmother, would live with Father for 6 weeks in the summer, and would not be allowed to live with Mother in any unsupervised environment. (Appendix 2.)

Section 40-4-228 expressly forbids a court from entertaining a petition for parental interest under Title 40 during the pendency of a Title 41 abuse and neglect action, however. As this section provides: "In cases where a nonparent seeks a parental interest in a child under 40-4-211 or visitation with a child, the provisions of this chapter apply unless a separate action is pending under title 41, Ch. 3." Mont. Code Ann. § 40-4-228 (emphasis added).

Given this express statutory prohibition, Grandmother lacked standing to bring the parental interest action while the Title 41 action was pending. *See In re Parenting of J.D.B.*, 2009 MT 428N, ¶ 6 (recognizing that where a grandmother sought a parental interest while a Title 41 case was pending, "Mother correctly cited §40-4-228 MCA for the proposition that Grandmother had no standing to file a petition for custody. . . .")

As the Court has recognized:

> Standing is a person's right to make a legal claim or seek judicial enforcement of a duty or right. Black's Law Dictionary, Seventh Edition. Standing is closely linked to a court's jurisdiction — a court that would otherwise have jurisdiction to hear and decide a matter will not have jurisdiction if a person without standing attempts to bring the action.

In re Parenting of D.A.H., 2005 MT 68, ¶ 8, 326 Mont. 296, 109 P.3d 247.

Standing is determined at the time of filing of the initial petition and refers to the threshold justiciability requirement that a plaintiff have a personal stake in a particular case. *Ballas v. Missoula City Bd. of Adjustment*, 2007 MT 299, ¶ 14, 340 Mont. 56, 172 P.3d 1232. If a plaintiff lacks standing a court can grant no relief because a justiciable controversy does not exist. *Ballas*, ¶ 14. And, in cases where fundamental rights are implicated, standing serves a function beyond a mere jurisdictional prerequisite—it serves too to ensure that a statutory scheme is narrowly tailored as required by strict construction. *Fish v. Fish*, 939 A.2d 1040, 1051 (2008). Standing is a threshold requirement of every case, and may be raised sua sponte by the court. *Palmer v. Bahm*, 2006 MT 29, ¶ 16, 331 Mont. 105, 128 P.3d 1031.

This Court has held fast in denying award of custody to third parties lacking standing, even in the face of difficult factual situations. *In re D.A.H.*, ¶ 8. As the Court stated in *In re D.A.H.*, a case assessing third party standing: "We agree there is evidence to suggest that the father may not be the best of custodians for the children; such factors make decisions like this

very difficult to make. However, the fact remains that a party claiming entitlement to custody must comply with the procedural requisites noted above." *In re D.A.H.*, ¶ 12. Otherwise, "if best interest were the sole factor deserving consideration then any person asserting best interest would arguably have standing to gain their custody." *In re D.A.H.*, ¶ 12.

Here, as the Title 41 abuse and neglect case was already filed at the time Grandmother filed her Petition, Grandmother lacked standing to petition for a parental interest and the Court lacked jurisdiction to award her any custody or visitation. Its order purporting to do so is void.

Even assuming arguendo that standing was not an issue, the court nonetheless erred by making a parenting plan determination between Grandmother and Father in the course of the Title 41 action. The Court has held that even parenting plan actions uncomplicated by questions of parental interest are to be considered only after the dismissal of an ongoing abuse and neglect action. *In re S.S.*, ¶ 17 (holding that a Title 40 parenting plan action is the appropriate forum after an abuse and neglect action has been dismissed and the State is no longer a party.)

B. The district court erred in applying best interest factors in approving a permanent plan of placement of A.J.C. with a third party over a natural and fit parent in an abuse and neglect proceeding

1. The court erred in applying a best interest test between the natural parent and a third party

As described above, Grandmother was precluded from seeking a parental interest while the Title 41 action was proceeding. Even with jurisdictional questions set aside, however, it does not appear from the record that the court ever awarded Grandmother a parental interest. Montana code sets forth specific elements that must be proven by clear and convincing evidence for an award of a parental interest. *See* Mont. Code Ann. § 40-4-228 and 40-4-211. Neither the

parenting plan nor any other order of the court makes any reference to the relevant parental interest statutes nor do they include any findings or conclusions regarding their required elements. (See DR D.C. Doc. 62.) Rather, the Findings, Conclusions, and Parenting Plan purportedly ordering that A.J.C. would reside primarily with Grandmother, refers only to the best interest statute, Mont. Code Ann. § 40-4-212, and the parenting plan statute, Mont. Code Ann. § 40-4-234. This Court has repeatedly held that adequate findings of fact and conclusions of law are required. *In re Marriage of Banka*, 2009 MT 33, ¶9, 349 Mont. 193, 201 P.3d 830; *Jacobsen v. Thomas*, 2006 MT 212, ¶ 19, 333 Mont. 323, 142 P.3d 859 (citations omitted). Given the absence of findings, conclusions, or any order granting her a parental interest, Grandmother must be considered as no more than a third party in the Court's analysis here.

Given the fundamental rights at stake, where a court must assess custody between a third party and a natural parent, "it has long been the law in Montana that the right of the natural parent prevails until a showing of a forfeiture of this right." *In re Guardianship of Ashenbrenner*, 182 Mont. 540, 597 P.2d 1156, 1163 (1979) (*citing Ex Parte Bourquin*, 88 Mont. 118, 290 P. 250 (1930).) *Girard v. Williams*, 1998 MT 231, ¶ 16, 291 Mont. 49, 966 P.2d 1155. The best interest of the child test cannot constitutionally be used to deprive a fit parent, capable of providing a safe home, in favor of a third party. *In re A.R.A.*, 919 P.2d at 391; *In re M.G.M.*, 201 Mont. 400, 654 P.2d 994, 998 (1994); *In re Guardianship of Aschenbrenner*, 597 P.2d at 1162; *In re Guardianship of Doney*, 570 P.2d at 578; *In re J.N.P.*, 2001 MT 120, ¶ 15, 18, 305 Mont. 351, 27 P.3d 953; *Babcock v. Wonnacott*, 268 Mont. 148, 885 P.2d 522, 524-25 (1994); *In re J.B.*, 278 Mont. 160, 923 P.2d 1096 (1996). As the Court has stressed, "our case law does not permit destruction of a natural parent's fundamental right to the custody of his or her child based simply on the subjective determination of that child's best interests." *In re J.N.P.*, ¶ 26. "The

use of the best interest of the child test . . . is improper in that any showing that a nonparent may be able to provide a better environment than can a natural parent is irrelevant to the question of custody between the two in view of the constitutional rights of a parent to custody . . . . *In re A.R.A.*, 919 P.2d at 392.

Also, as the Court has recognized, "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believe a 'better' decision could be made." *Polasek*, ¶ 15; *Troxel*, 530 U.S. at 72-73. "The state is entirely powerless to deprive a natural parent of the custody of his minor children merely because a district judge or a state agency might feel that a nonparent has more financial resources or pursues a 'prefereable' lifestyle." *In re Guardianship of Aschenbrenner*, 597 P.2d at 1162; *Babcock*, 885 P.2d at 524; *In re Guardianship of Doney*, 570 P.2d at 578.

Even to the extent best interest is to be considered, in an abuse and neglect proceeding, the Court has explicitly stated that, "we have adopted the presumption that the best interest of a child is served in the custody of the natural parents." *In re J.H.*, 2016 MT 35, ¶ 23, 382 Mont. 214, 367 P.3d 339; *Santosky v. Kramer,* 455 U.S. at 767 ("while there is still reason to believe that positive, nurturing parent-child relationships exist, the [State's] *parens patriae* interest favors preservation, not severance of natural familial bonds.") *See also*, *In re Guardianship of J.R.G.*, 218 Mont. 336, 708 P.2d 263, 267 (1985) (recognizing "the presumption in other jurisdictions, and now adopted by this Court, that the best interest of a child is served in custody of natural parents.")

Throughout the proceedings here, Grandmother, the child's attorney, and the CASA continuously and impermissibly argued that even though the abuse and neglect statutes might mandate placement with Father, it was in A.J.C.'s best interest to live with Grandmother.

(9/8/15 Tr. at 17; DN D.C. Doc. 116.) These parties stressed that A.J.C. had long ties and was comfortable in his community, had a strong bond with Grandmother, and really wanted to live with his Grandmother. They contrasted that A.J.C. had only recently formed a bond with Father and did not want to move to live with him. (DN D.C. Docs 60, 71, 106, 116; 9/8/15 Tr. at 13, 17.) The Department likewise interjected an impermissible best interest analysis into the case when it invited the court, in the child's best interest, to jointly consider both Grandmother and Father for permanent placement, even though it had determined that Father was a safe and adequate placement and that it had no reason to deny placement. (DN D.C. Doc. 69, 90; 4/12/16 Tr. at 8-11.) And, the court ultimately engaged in an impermissible and unconstitutional best interest balancing test between Grandmother and Father. (9/8/17 Tr. at 70; DR D.C. Doc. 62 (finding that although both homes were found to be safe and appropriate, it was in the best interest for Grandmother to have primary residential custody.)

Recently, the Court stated that, "nothing in the statutes or our precedents suggests a district court must explicitly find a parent is unfit before it may determine the best interests of the child in a long-term custody proceeding." *In re J.H.*, 2016 MT 35, ¶ 23. In *In re J.H.*, the Court rejected the father's position that the district court erred as a matter of law by not explicitly finding that father was 'unfit' before determining it was in the child's best interests to be placed with a great aunt. *In re J.H.*, ¶ 23. Although in *In re J.H.*, the Montana Supreme Court affirmed the approval of a permanency plan of long-term custody in the Department and guardianship to a relative over a Father, the facts of that case are distinguishable and do not govern the outcome here.

In re J.H. involved an abuse and neglect case where, as here, the biological father resided out of state. Unlike the case here, however, the sister state in *In re J.H.* declined to approve the

father in that case as a placement option based on a home study performed under the Interstate Compact on the Placement of Children (ICPC). *In re J.H.*, ¶ 7. A second, private home study commissioned by the father in that case also failed to recommend the father as an appropriate placement. *In re J.H.*, ¶ 10. As the father there had not been approved for placement under an ICPC, or a private home study, the Department could not ensure that the placement with the father was safe and was therefore precluded from placing the child with the father under the ICPC. Thus, there, the evidence showed that the Department had exhausted all avenues for placement with the father, but that he was not a placement option under the controlling abuse and neglect statutes. *In re J.H.*, ¶ 20. Without the father's viability as a placement option, the Court had no option other than to assess the propriety, though a best interest analysis, of the placement option that was available.

Here, however, Father was twice approved for placement by the ICPC conducted by Oregon, and has been explicitly approved as a safe placement option by the Department. Conducting a best interest analysis between Grandmother and Father here was in error and impermissibly infringed on his fundamental, constitutional rights.

2. The court erred by comingling and conflating different statutory best interest tests

As is clear from its Order, the court relied on its decision in the parenting plan case to inform its decision in the abuse and neglect case. (Appendix 1, pgs. 2, 3, 4, 5, 7.) *See also* DN D.C. Doc. 95 (Year 1 Permanency Plan Order approving permanent placement with Grandmother based on court's order in DR-14-71 and DR-15-37 granting Grandmother primary residential custody). As argued above, the parenting plan order is void, *see supra*. Even assuming *arguendo* it was not, however, as these two cases were governed by two different and

distinct statutory schemes and two different and distinct best interests tests, the court was in error in relying on any of the determinations it had made about the child's best interest in the parenting plan case to inform its decisions in the abuse and neglect case.

As this Court has explicitly recognized, the term "best interest" is defined by, and is particular to, individual statutes, and is not a universal concept for use across statutes. For instance, in describing how the best interest test should be applied in Indian Child Welfare Act (ICWA) cases arising under 25 U.S.C. § 1912, et seq., "this Court has determined that the "best interests of the child" test will be applied in Montana in determining good cause not to transfer jurisdiction of custody proceedings of Indian children under § 1911(b). . . . The Court explicitly warned however that:

> [t]his "best interests of the child" test should not be confused with the "best interests of the child" test applied under § 40-4-212, MCA, in custody determinations between parents in a dissolution. It should also not be confused with the criteria used to determine child abuse, neglect, and dependency and to terminate parent-child legal relationships under Title 41Chapter 3, MCA.

In re T.S., 245 Mont. 242, 801 P.2d 77, 80 (1990).

Here, the district court impermissibly intertwined multiple actions arising under different statutes and governed by different titles and statutory schemes. It held a combined Title 40 parenting plan/Title 41 permanency plan hearing where it allowed all attorneys to question all witnesses, thus allowing the Department to participate in the parenting plan case to which it was not party, and Grandmother to participate in the abuse and neglect case to which she was not yet a party. (See 4/12/16 Tr. at 3, 12, 15.) It was erroneous for the court to intermingle the statutory best interest tests and to base its decisions regarding permanent placement in the abuse and neglect case on its order in the parenting plan case. (DN D.C. Doc. 95; Appendix 1.)

[*End of excerpt*]

TRACY LABIN RHODES WRITING SAMPLE

[Note: This is an excerpt from sections of the Opening and Reply briefs in In re A.A.G.G., Supreme Court No. DA 18-0612, currently awaiting decision by the Montana Supreme Court]

MONTANA CODE ANNOTATED § 41-3-110 IS UNCONSTITUTIONAL ON ITS FACE AS IT DOES NOT MEET THE MINIMUM REQUIREMENTS OF DUE PROCESS AND VIOLATES EQUAL PROTECTION

Section 41-3-110 provides:

> A court may permit testimony by telephone, videoconference, or other audio or audiovisual means at any time in a proceeding pursuant to this chapter.

Mont. Code Ann. § 41-3-110.

The blanket permission for telephonic, videoconference, or other audio-visual testimony is permitted only under Mont. Code Ann. § 41-3-110 in abuse and neglect proceedings under Title 41 of the Montana Code. Under the Montana Rules of Evidence, other civil litigants are entitled to the right of confrontation and cross-examination contained in Mont. R. Evid. Rule 611 (e), which provides:

> Confrontation. Except as otherwise provided by constitution, statute, these rules, or other rules applicable to the courts of this state, at the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine.

Mont. R. Evid. Rule 611 (e).

The Montana Supreme Court has emphasized the importance of the right of confrontation under Rule 611 (e), and has assessed whether telephonic testimony sufficiently comports with the right of confrontation. *In re the Marriage of Bonamarte*, 263 Mont 170, 866 P.2d 1132 (1993). The sole issue addressed by the Court in *Bonamarte*, a dissolution case, was whether one party was properly allowed to testify by telephone where the other party objected to such telephonic testimony. *Bonamarte*, 866 P.2d at 1133. The Court explained that:

> Requiring a witness to testify personally at trial serves a number of important policies and purposes. A witness' personal appearance in court: (1) assists the trier of fact in

> evaluating the witness' credibility by allowing his or her demeanor to be observed firsthand; (2) helps establish the identity of the witness; (3) impresses upon the witness, the seriousness of the occasion; (4) assures that the witness is not being coached or influenced during testimony; (5) assures that the witness is not referring to documents improperly; and (6) in cases where required, provides for the right of confrontation of witnesses.

Bonamarte, 866 P.2d at 1134 (citations omitted).

In describing the right of confrontation, the Court recognized that, "the right of confrontation long provided in all criminal cases, is also *required* in civil cases in Montana under Rule 611 (e)." *Bonamarte*, 866 P.2d at 1134. Explaining the importance of the right to in person confrontation in civil cases, the Court cited *Coy v. Iowa*, 487 U.S. 1012, 1019-1020, 108 S.Ct. 2798, 2802, 101 L.Ed.2d 857, for the proposition that:

> The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it . . . . Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss—the right to cross-examine the accuser; both ensur[e] the integrity of the factfinding process.

Bonamarte, 866 P.2d at 1135.

As the Court explained, the principles behind the right to confront witnesses described in *Coy*, which was a criminal case, were equally as applicable in civil cases in Montana. *Bonamarte*, 866 P.2d at 1135. The Court expounded that:

> [t]he integrity of the factfinding process at trial is undermined where the parties do not have the opportunity to confront each other or the witnesses, where the finder of fact does not have the opportunity to observe the parties and the witnesses and where the opposing party cannot effectively cross-examine the other party or the witnesses.

Bonamarte, 866 P.2d at 1135. As the Court further explained:

> If the phrase 'a witness can be heard only in the presence and subject to the examination of all the parties . . .' is to have any meaning . . . the witness must be physically present in the courtroom to testify personally at trial unless all parties and the court agree to a different method of examination which protects the parties' rights of confrontation and cross-examination and, at the same time, allows the fact finder to assess the witness' credibility, testimony, and the evidence presented.

Bonamarte, 866 P.2d at 1135.

In *Bonamarte*, the Court held that allowing telephonic testimony over objection was not an acceptable substitute to the party's personal appearance at trial, "particularly given the significance placed upon the right to confront witnesses in civil trials as set forth in Rule 611 (e)." *Bonamarte*, 866 P.2d at 1137. As the Court recognized, "'[t]he opportunity to observe a witness is so critical to judicial control and effective cross-examination that its denial is manifestly prejudicial.'" *Bonamarte*, 866 P.2d at 1137 (citation omitted). Thus, in *Bonamarte*, the Court concluded that with only the telephonic appearance, and not the physical presence of one of the parties, the trial was not fair. *Bonamarte*, 866 P.2d at 1135.

Although the Court in *Bonamarte* indicated that it was not creating a *per se* rule precluding telephonic testimony, it indicated that for such telephonic testimony to be allowed, all parties would need to consent, or at least have sufficient notice to object or make alternative arrangements, and that the use of telephonic testimony would only be allowed only under special or exigent circumstances. *Bonamarte,* 866 P.2d at 1136.

As the Court has oft held, Article II, Section 17, the Montana Constitution provides that, "[n]o person shall be deprived of life, liberty, or property without due process of law." *In re K.F.G.*, 2001 MT 140, 306 Mont. 1, 29 P.3d 485. This right to due process includes the right of confrontation and cross examination, even in civil cases. *Bean v. Montana Bd. of Labor Appeals*, 1998 MT 222, ¶ 34-36, 290 Mont. 496, 965 P.2d 256. The Court has declared, "we have 'been zealous to protect these rights from erosion" not only in criminal cases but in civil and administrative cases as well.'" *Bean*, ¶ 32.

Under Montana law, that minimum requirements of due process include, "the opportunity to be heard in person," and "the right to confront and cross-examine adverse witnesses." *State v. Finley*, 276 Mont. 126, ¶ 31, 915 P.2d 208 (1996). *See also State v. Megard*, 2006 MT 84, ¶ 23, 332 Mont. 27, 134

P.3d 90 (Recognizing in a non-criminal trial that, "[o]ne of the minimum due process requirements is 'the right to confront and cross-examine adverse witnesses.'")

Like the Montana Supreme Court, the United States Supreme Court has also recognized the importance of, and indeed, the due process requirement, that civil litigants have the opportunity to confront and cross-examine adverse witnesses. *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (holding that, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.") In describing the minimum due process rights in civil cases, "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. at 267. This includes the right of the litigant to confront and cross examine adverse witnesses. *Goldberg*, 397 U.S. at 270. *See also Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (holding that minimum requirements of due process in non-criminal trials include "the right to confront and cross-examine adverse witnesses," absent good cause.) As the United States Supreme Court has held, the elements of confrontation include, physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. *Maryland v. Craig*, 497 U.S. 836, 846, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). And, as the United States Supreme Court has also held, where a State's law did not allow the litigants to appear personally to confront and cross examine, such "omissions are fatal to the constitutional adequacy of the procedures." *Goldberg*, 397 U.S. at 268.

The United States Supreme Court has recognized that, while the right to in-person confrontation is not absolute, "that does not, of course, mean that it may easily be dispensed with." *Craig*, 497 U.S. at 850. Rather, only "in certain narrow circumstances" and "occasionally," may a court find that upon close examination of a particular case, competing interests and the necessities of the case may warrant dispensing with face-to face confrontation. *Craig*, 497 U.S. at 848.

Although this Court has upheld telephonic testimony, it has done so only on a case-by-case basis where special circumstances or good cause existed, and where the Court was satisfied that due process protections had been ensured. For instance, in *Megard*, the Court found that, under the "unique circumstances" of the case, good cause permitted a witness' telephonic testimony where the district court had knowledge of the witness, corroborating testimony allowed the court to adequately assess the witness' credibility, scheduling problems prevented the witness' appearance, and any error was harmless. *Megard* at ¶ ¶ 19, 26, 28, 29, 30.

However, the opposite has also been true. For instance, *In re B.C.*, 283 Mont. 423, 942 P.2d 106, 109 (1997), the Court held that the circumstances which would allow telephonic testimony were not present because all parties did not consent, and there were no special or exigent circumstances dictating the necessity for telephonic testimony. Similarly, in *Taylor v. Taylor*, 272 Mont. 30, 899 P.2d 523 (1995), the Court held that substantial rights were prejudiced where an administrative law judge did not permit parties to participate "in person."

Furthermore, the Court has drawn a distinction between telephonic testimony and video-conferencing testimony. In *City of Missoula v. Duane*, 2015 MT 232, 380 Mont. 290, 355 P.3d 729 the Court held:

> We conclude that the Municipal Court did not abuse its discretion in allowing [a witness] to testify via Skype, and the District Court did not err in upholding that decision. The concerns underlying our decision in *Bonamarte* with respect to cross-examination by telephone simply do not exist in this case and with this technology. **While telephone testimony presents the listener with a disembodied voice and no clue as to the demeanor of the witness**, Skype allows the court and jury to observe and hear the testimony of the witness firsthand.
>
> *Duane*, ¶ 20 (emphasis added).[1]

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[1] The Court further stated that:
The preferred method of introducing the testimony of a witness at trial is by way of the personal presence of the witness in the courtroom. However, where a moving party makes an adequate showing on the record that the personal presence of the witness is impossible or impracticable

As the United States Supreme Court has admonished, "[i]f anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections . . . . When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Santosky*, 455 U.S. at 753-54.

However, under Mont. Code Ann. § 41-3-110, a court need not conduct any analysis regarding the adequacy of the process due a parent regarding his right to personally confront and cross examine witnesses before depriving a parent of his fundamental and constitutionally protected right to the care and custody of his child. Rather, the statute gives a court the authority to automatically divest a parent his due process right to personally confront and cross examine the witnesses against him. This preemptive power is allowed even over the objection of a parent, without any assessment of whether credibility of the party or witness may be established, without any confirmation that the witness' identity can be firmly established, without any assurance that the party or witness understands the seriousness of the occasion, without any assurance that the party or witness is not being coached or influenced during testimony, without any assurance that the party or witness has access to pertinent documents or is referring to documents properly, without any analysis of whether there are exigent circumstances, without any analysis as to whether good cause exists to infringe upon the parent's right to confront and cross examine, and without any other inquiry into whether telephonic appearance would disadvantage a parent, or that it would ensure fundamentally fair procedures. Such unbridled

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> to secure due to considerations of distance or expense, a court may permit the testimony of the witness to be introduced via Skype or a substantially similar live 2-way video/audio conferencing program that satisfies the hallmarks of confrontation as herein set forth. Under the circumstances presented here, the District Court did not abuse its discretion in permitting the Skype testimony.

Duane, ¶¶ 21, 25.

and unchecked discretion violates a parent's right to due process and makes § 41-3-110 invalid on its face.

Appellee argues that, "a party bringing a facial challenge must 'establish that no set of circumstances exists under which the [statute] would be valid'—that is, that the law is unconstitutional in all of its applications." (Appellee Br. at 25) (*citing Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131; *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). Based on these judicial pronouncements, Appellee argues that Father's facial challenge must fail.

While Appellee does correctly cite statements made by both this Court and the United States Supreme Court, these bald statements do not go far enough to answer whether Mont. Code Ann. § 41-3-110 is facially invalid. As indicated in both cases cited by Appellee, for the Court to determine whether a statute fails a facial challenge, the Court must conduct full and appropriate due process and equal protection analysis.

In *Salerno*, a case cited by Appellee, the United States Supreme Court was faced with an argument that the Bail Reform Act of 1984, an act which allowed courts to determine whether an arrestee would be detained without condition, was unconstitutional on its face. *Salerno*, 481 U.S. at 744. Before determining that the act was facially valid, the Court completed a due process analysis in which it examined the State's interest, and ultimately determined that the State's regulatory interest was legitimate, compelling, and "overwhelming." *Salerno*, 481 U.S. at 747, 50. The Court then determined that the act was narrowly tailored to address the "particularly acute" problems the government was attempting to address, and did so with "extensive safeguards," and "procedural protections." *Salerno*, 481 U.S. at 752.

In assessing and describing the narrow tailoring, the Court explained that the Bail Reform Act did not give a judicial officer "unbridled discretion" in making detention determinations. *Salerno*, 481

U.S. at 742. Rather, the Court recognized that through the statute, Congress, "specified," and made "careful delineation," of the considerations relevant to detention decisions. *Salerno*, 481 U.S. at 742 751. The Court also recognized that the statute afforded the accused a full-blown adversarial hearing at which he had a right to counsel, had the right to testify, to call witnesses, and to cross-examine the state's witnesses before the court could approve detention without condition. The Court also recognized that the statute required the state to establish the statutorily identified factors by clear and convincing evidence, required the court to issue written findings of fact, and provided the accused with a right to an immediate appeal of the court's detention decision. *Salerno*, 481 U.S. at 742. The Court deemed that these statutory requirements provided, "extensive safeguards sufficient to repel a facial challenge." *Salerno*, 481 U.S. at 752.

Likewise, in *Cannabis*, the second case cited by the Appellee, the Montana Supreme Court also did a full constitutional analysis in assessing the facial validity of a statute. In that case, the Court determined that the rights affected by the involved statute were not fundamental, and thus examined the challenged statutory provisions under a rational basis analysis to determine whether they served a legitimate objective, and whether the provisions were reasonably related to achieving those objectives. *Cannabis*, ¶ 30. Although the Court found that most of the challenged provisions did survive this rational basis analysis, it held one of the provisions facially unconstitutional on equal protection grounds given that the provision was not reasonable when balanced against the purpose of the challenged act. *Cannabis*, ¶¶ 55-56.

As both the Montana and United States Supreme Court have clearly determined, where a fundamental right is implicated, in determining whether a statute facially violates substantive due process under the Fourteenth Amendment to the United States Constitution, and Article II, section 17 of the Montana Constitution, strict scrutiny must be applied. *Malcomson v. Northwestern*, 2014 MT 242, ¶ 14, 376 Mont. 306, 339 P3d 1235 (where legislation infringes on a fundamental right it must be

reviewed under a strict scrutiny analysis). Under strict scrutiny, a statute must be justified by a compelling state interest and must be narrowly tailored to effectuate only that interest. *Malcomson*, ¶ 14. *In re S.M.,* 2017 MT 244, ¶ 17, 389 Mont. 28, 403 P.3d 324 ("If the purported right is fundamental, any governmental restriction must pass strict judicial scrutiny"). *Washington v. Glucksberg* , 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). As the United States Supreme Court has held, "the Fourteenth Amendment forbids the government to infringe . . . fundamental liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

Here, the right impinged by Mont. Code Ann. § 41-3-110, is the fundamental right to confrontation and cross examination. Thus, this statute must be justified by a compelling state interest, and must be narrowly tailored to effectuate only that interest. However, neither of these elements are met here.

Indeed, the Appellee has proffered no state interest justifying the enactment of Mont. Code Ann. § 41-3-110, and has offered no explanation as to how this statute is narrowly tailored to achieve a state interest. Even assuming *arguendo*, that the state may have an interest in expeditiously concluding cases involving abused or neglected children so as to effect permanency, or may have an interest in conserving state resources, those interests are insufficiently compelling to justify abridging a parent's fundamental rights to fair process in abuse and neglect, and especially, termination proceedings. Also, even assuming *arguendo*, the validity of state interests, Mont. Code Ann. § 41-3-110 is not narrowly tailored to effectuate any possible purpose for the statute. This statute contains no parameters or limitations, but rather gives a court unbridled discretion to deprive a parent of the right to confront and cross-examine. Unbridled discretion is not narrow tailoring.

In addition to violating parents' due process rights, Mont. Code Ann. § 41-3-110 violates equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and Article II, Section 4 of the Montana Constitution. As this Court has explicitly held, for equal protection purposes, parents facing termination in proceedings brought by the state are similarly situated to parents facing termination in private proceedings. *In re Adoption of A.W.S.*, 2014 MT 322, ¶ 15, 377 Mont. 234, 339 P.3d 414. As the Court has further explicitly held, a parent's interest in one's child is a fundamental right, and statutes and procedures which implicate those fundamental rights require the Court to apply strict scrutiny in an equal protection analysis. *In re A.W.S.*, ¶ 16.

In applying the strict scrutiny standard, the Court determines whether the disparity in the current statutory framework is narrowly tailored to serve a compelling governmental interest. *In re A.W.S.*, ¶ 17. The burden to prove whether the statute is narrowly tailored to serve a compelling governmental interest falls on the State. *In re A.W.S.*, ¶ 17.

Just as it failed to do in the due process context, Appellee has likewise proffered no argument that Mont. Code Ann. § 41-3-110 furthers a compelling state interest, nor that the statute is narrowly tailored to serve such an interest. As the statute serves neither a compelling state interest, nor is it narrowly tailored to serve any state interest, under an equal protection analysis, § 41-3-110 is unconstitutional on its face and must be struck down.